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Supreme Court, U.S.
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No. 06-6911

IN THE

Supreme Court of the United States

JAMES D. LOGAN,

Petitioner

v.

UNITED STATES OF AMERICA,

Respondent

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the "civil rights restored" provision of 18 U.S.C. § 921(a)(20) applies to a conviction for which a defendant was not deprived of his civil rights thereby precluding such a conviction as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(1)?

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STATEMENT OF INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is a New York not-for-profit membership corporation founded in 1871.[1] NRA has four million individual members and 10,700 affiliated members (clubs and associations) nationwide. Among its purposes, as set forth in its Bylaws, are:

> 1. To protect and defend the Constitution of the United States, especially with reference to the inalienable right of the individual American citizen guaranteed by such Constitution to acquire, possess, transport, carry, transfer ownership of, and enjoy the right to use arms, in order that the people may always be in a position to exercise their legitimate individual rights of self-preservation and defense of family, person, and property, as well as to serve effectively in the appropriate militia for the common defense of the Republic and the individual liberty of its citizens;
>
> 2. To promote public safety, law and order, and the national defense;
>
> 3. To train members of law enforcement agencies, the armed forces, the militia, and people of good repute in marksmanship and in the safe handling and

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[1] No counsel for any party to this case authored this brief in whole or in part and no person or entity other than the *Amicus Curiae* made a monetary contribution to the preparation or submission of this brief. This brief is filed with the written consent of all parties.

efficient use of small arms . . . .

NRA represents its members' interests regarding the interpretation of federal statutes which determine eligibility for the lawful receipt and possession of firearms. While this case arises in a sentencing context, the same definition in 18 U.S.C. § 921(a)(20) applies to whether a person may lawfully transfer a firearm to another person, and whether that other person may lawfully receive or possess a firearm. It also applies to whether a person is eligible to have a federal firearms license.

The NRA regularly files briefs in cases in which it is a litigant or an amicus curiae. NRA filed an amicus curiae brief in *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which refused to recognize the disposition of criminal charges under State law for purposes of 18 U.S.C. § 921(a)(20), the provision at issue here. NRA participated in the legislative process leading to the enactment of the Firearms Owners' Protection Act of 1986 ("FOPA"), which revised § 921(a)(20) and overruled *Dickerson*. This Court would benefit from NRA's perspective in this case.

SUMMARY OF ARGUMENT

A conviction may entail taking away one or more of three civil rights – the rights to vote, run for office, and serve on a jury – or it may not entail taking away any of them. An offender who "has had civil rights restored" under 18 U.S.C. § 921(a)(20) is one who currently has all three civil rights, regardless of how many (if any) were taken away and returned.

A person convicted of a more serious crime who has all three civil rights taken away and has them returned is not subject to mandatory sentencing or the prohibition on firearm possession. A person convicted of a less serious crime who

does not lose any civil rights should be considered as having civil rights restored and should not be subject to mandatory sentencing or the prohibition on firearm possession.

FOPA enacted Findings indicating Congress' understanding that law-abiding citizens have a right to keep and bear arms. The Act's prohibitions and exceptions should be interpreted with this purpose in mind. The civil-rights-restoration provision reflects that an ex-offender currently has the rights to vote, run for office, and serve on a jury, thus is considered to be a law-abiding citizen, and should not be subject to a lifetime prohibition on firearms ownership.

It is irrational to allow persons with more serious criminal records to avoid mandatory minimum incarcerations and to possess firearms, but to subject persons with less serious records to the mandatory minimums and to the prohibition on firearm possession. The provision should be construed to avoid this difficult constitutional question under the equal protection component of the due process clause of the Fifth Amendment.

The legislative history of FOPA demonstrates an expansive meaning of restoration of civil rights. Congress intended that, where State convictions are the predicate for federal deprivation of gun ownership, State law should also prevail when it mandates that certain convictions are not sufficiently serious to deprive persons of gun ownership. Eligibility for firearms possession is based on whether one has his or her full civil rights and is not prohibited from firearm possession under State law.

Section 921(a)(20) contrasts with § 921(a)(33)(A), which defines "misdemeanor crime of domestic violence" to exclude a person who "has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights

under such an offense) . . . ." The parenthetical would be unnecessary if "civil rights restored" necessarily requires that the applicable jurisdiction provide for the loss of civil rights.

The government has not been consistent in its interpretation of the word "restore." It has argued that an item may be "readily restored" to being a certain type of firearm where it has never previously been such. That violates the rule that criminal statutes must be construed narrowly against the government. That same rule applies here given that one would not be on notice that a person convicted of a serious crime may have civil rights restored and may possess firearms, but a person convicted of a minor crime could never have civil rights restored and may not possess firearms.

ARGUMENT

I. A PERSON WHO "HAS HAD CIVIL RIGHTS RESTORED" IS A PERSON WHO HAS ALL CIVIL RIGHTS, REGARDLESS OF HOW MANY (IF ANY) WERE TAKEN AWAY AND RETURNED

A conviction may entail taking away one or more of three civil rights – the rights to vote, run for office, and serve on a jury – or it may not entail taking away any of them. An offender who "has had civil rights restored" under 18 U.S.C. § 921(a)(20) is one who currently has all three civil rights, regardless of how many (if any) were taken away and returned.

The Firearms Owners' Protection Act ("FOPA"), § 102, P.L. 99-308, 100 Stat. 449, 449-50 (1986), amended § 921(a)(20) to provide the following definition:

> The term "crime punishable by imprisonment for a term exceeding one year"

> does not include –
>
> (A) any Federal or State offenses pertaining to antitrust violations, unfair trade practices, restraints of trade, or other similar offenses relating to the regulation of business practices, or
>
> (B) any State offense classified by the laws of the State as a misdemeanor and punishable by a term of imprisonment of two years or less.
>
> What constitutes a conviction of such a crime shall be determined in accordance with the law of the jurisdiction in which the proceedings were held. Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

A person who has been convicted of a "crime punishable by imprisonment for a term exceeding one year" and who possesses a firearm is subject to ten years imprisonment.[2] A person indicted for such crime who receives

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[2]*See* 18 U.S.C. § 922(g)(1) (unlawful to possess or receive firearm); § 922(d)(1) (unlawful knowingly to transfer firearm to such person); § 924(a)(2) (ten years imprisonment for knowing violation of § 922(d), (g)).

a firearm is subject to five years imprisonment.[3] A person who is so convicted and has three defined predicate offenses is subject to mandatory imprisonment of fifteen years.[4] Such conviction also precludes a person from being eligible to obtain a federal firearms license or to continue in a licensed firearms business.[5]

The last two sentences of § 921(a)(20) may be referred to as the "choice-of-law clause" and the "exemption clause" respectively. *Beecham v. United States*, 511 U.S. 368, 369 (1994). The term "civil rights" in the exemption clause means the rights to vote, serve on a jury, and run for office.[6] Some

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[3]§ 922(n) (unlawful to receive firearm); § 924(a)(1)(D) (five years imprisonment for willful violation of "any other provision of this chapter").

[4]§ 924(e)(1) (mandatory sentencing for "a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony"); § 924(e)(2)(B) (defining "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" and certain other elements).

[5]§ 923(d)(1) (license shall be approved if person is not prohibited from receipt of firearm under § 922(g), (n)). *See also* § 925(b) (licensee indicted for crime punishable by imprisonment for a term exceeding one year may continue in business until conviction final).

[6]The right to possess arms has also been seen as a civil right, but the "unless clause" at the end of § 921(a)(20) specifically addresses whether a jurisdiction forbids a previously-convicted person to possess firearms. *See Cummings v. Missouri*, 71 U.S. 277, 321 (1867) (French penal code deprived persons of "civil rights," such as "the right of voting, of eligibility of office, . . . of bearing arms"); *Spencer v. Kemna*, 523 U.S. 1, 22 (1998) (Stevens, J., dissenting) (criminal conviction entails "loss of the right to vote or to bear arms"); *United States v. Sharp*, 12 F.3d 605, 608 (6th Cir. 1993) (conviction "deprive[s] an American citizen of civil rights as important as the right to vote, the right to keep and bear arms").

courts initially held that "civil rights must be restored by an affirmative act of a Government official," while others held that "they may be restored automatically by operation of law." *Id.* at 373 n.*, citing *United States v. Ramos*, 961 F.2d 1003, 1008 (1st Cir.), *cert. denied*, 506 U.S. 934 (1992) (former view),[7] and *United States v. Hall*, 20 F.3d 1066 (10th Cir. 1994) (latter view).

While it is now settled that either method suffices, the issue before this Court was already seething in the above cases. As stated in *Hall*, 20 F.3d at 1069:

> the *Ramos* interpretation, though plausible, produces results so unusual that if Congress had intended them it likely would (and easily could) have been more explicit. See *Thomas*, 991 F.2d at 212[8] (noting that under *Ramos* a person who never lost his civil rights is convicted under § 922(g), while a person convicted of a more serious offense and stripped of his civil rights is immunized from § 922(g) so long as his rights were affirmatively "restored") . . . .

Ramos' response was that the more serious offender had civil rights restored via an individualized decision, while the less serious offender did not, since his civil rights had not been taken away. 961 F.2d at 1009. But the first precedent to hold that civil rights may be restored by operation of law – *United States v. Cassidy*, 899 F.2d 543 (6th Cir. 1990) – stated:

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[7] *Ramos* was overruled in *United States v. Caron*, 77 F.3d 1, 5-6 (1st Cir.) (*en banc*), *cert. denied*, 518 U.S. 1027 (1996), which held that civil rights may be restored by operation of law.

[8] *United States v. Thomas*, 991 F.2d 206, 212 (5th Cir.), *cert. denied*, 510 U.S. 1014 (1993).

"There is no rational basis . . . for distinguishing between civil rights possessed by a felon after his release that were not expressly taken away, and those civil rights which were negated, by statute or otherwise, upon conviction or incarceration and then reinstated after his release." *Id.* at 549 n.13.

However, *McGrath v. United States*, 60 F.3d 1005 (2d Cir. 1995), held that rights never taken away cannot be "restored." That was followed by *United States v. Indelicato*, 97 F.3d 627, 631 (1st Cir. 1996), *cert. denied*, 519 U.S. 1140 (1997), holding that "that [defendant's] civil rights, to the extent that they were never taken away, should be treated as 'restored' for purposes of the federal statute." The case before this Court, *United States v. Logan*, 453 F.3d 804 (7th Cir. 2006), agreed with *McGrath*.

For the reasons set forth below, a conviction "for which a person . . . has had civil rights restored" should be read to include the situations where: (1) all three civil rights have been taken away and returned, (2) only one or two civil rights have been taken away and each civil right taken away has been returned, and (3) no civil rights were taken away and the person currently has all civil rights.

To be consistent, the government's position presumably is that all three civil rights must be taken away for a person to have "civil rights restored." If only two civil rights are taken away and then given back, the third civil right was not taken away and thus that one civil right has not been "restored." Or if only one civil right is taken away and then given back, only one civil right has been restored, and the other two are not. Indeed, since "civil rights" is plural, the government's logical position should be that restoration of only one "civil right" (singular) does not restore "civil rights" (plural). Yet such

non-contextual literalism creates nonsensical results.

The government has apparently agreed that one of the civil rights need not be taken away for a person to have "had civil rights restored." *See Caron v. United States*, 524 U.S. 308, 313 (1998) ("Aside from the unless clause, the parties agree Massachusetts law has restored petitioner's civil rights."). In that case the right to vote had not been taken away. *Caron*, 77 F.3d at 6.[9] Thus, where one civil right was not taken away and two were, or two civil rights were not taken away and one was, and the offender ends up having all three, the person is considered as having "civil rights restored." The underlying premise is that "civil rights restored" means, to the extent any civil rights were taken away, they must all be returned. If no civil rights were taken away, the person "has had civil rights restored" for purposes of § 921(a)(20).

By prohibiting possession of one type of firearm, "The State has singled out the offender as more dangerous than law-abiding citizens . . . ." *Caron*, 524 U.S. at 315. The State has done the same when it takes away civil rights for more dangerous crimes, and does not do so for less serious crimes. "Although either reading creates incongruities, petitioner's approach yields results contrary to a likely, and rational, congressional policy." *Id.* That applies here, where the government's position rewards persons convicted of more serious crimes and punishes those convicted of less serious

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[9]The First Circuit *en banc* noted in *Caron*: "We leave till another day the question whether, when *one* civil right is restored but two were never taken away, the same answer would prevail, together with the basic question whether the literal application of 'restore' to a case where no civil rights were taken away is so lacking in sense as to command the same result." *Id.*

crimes.[10] "Congress cannot have intended this bizarre result." *Id.* As *Caron* further explained:

> Congress responded to our ruling in *Dickerson* by providing that the law of the State of conviction, not federal law, determines the restoration of civil rights as a rule. . . . Restoration of the right to vote, the right to hold office, and the right to sit on a jury turns on so many complexities and nuances that state law is the most convenient source for definition.

Id. at 316.

"Most words have different shades of meaning and consequently may be variously construed . . . ." *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). The question is "how Congress could have envisioned" a provision "actually working" if applied expansively, and avoiding "strange and indeterminate results." *Nixon v. Missouri Municipal League*, 541 U.S. 125, 126 (2004). *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000), notes:

> The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. . . . A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," . . . and "fit, if

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[10]The absurd results under the government's position may be exemplified as follows. Defendant A is convicted of the felony of malicious wounding, he loses civil rights, and thus can have them restored. Defendant B is convicted of the lesser-included offense of misdemeanor assault (punishable by more than two years), he loses no civil rights, and thus cannot have them restored.

possible, all parts into an harmonious whole . . . . ." (Citations omitted).

"A literal application of a statute which would lead to absurd consequences is to be avoided whenever a reasonable application can be given which is consistent with the legislative purpose." *United States v. Ryan*, 284 U.S. 167, 175 (1931).

The legislative purpose is also exhibited elsewhere in the statute. FOPA, § 105, 100 Stat. 459, amended § 925(c) to provide that the Secretary of the Treasury (now the Attorney General) may grant relief from disabilities to a person prohibited from firearm possession based on a finding that "that the applicant will not be likely to act in a manner dangerous to public safety and that the granting of the relief would not be contrary to the public interest."[11]

Similarly, the premise of § 921(a)(20) is that a person in possession of full civil rights is not likely to act in a manner dangerous to public safety and that possession of a firearm by such person would not be contrary to the public interest unless the jurisdiction in question forbids such possession.

To be sure, "people in some jurisdictions would have options open to them that people in other jurisdictions may lack." *Beecham*, 511 U.S. at 373. However, *Beecham* did not address the issue here, i.e., how to read the restoration provision as applied to persons within the *same* jurisdiction.

Rejecting a non-contextual literalism, this Court has held that the term "any conviction" in § 921(a)(20) excludes foreign convictions. *Small v. United States*, 544 U.S. 385, 388

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[11]In recent years, there has been an annual appropriations rider prohibiting ATF from processing petitions to remove disabilities under § 925(c). *United States v. Bean*, 537 U.S. 71, 74-75 (2002). This does not reflect on the intent of the earlier Congress that passed FOPA.

(2005) ("The word 'any' considered alone cannot answer this question."). *Small* sought to avoid "an apparently senseless distinction" in coverage based on different jurisdictions. *Id.* at 392.[12] Non-contextual literalism here creates a senseless distinction in the same jurisdiction between less serious crimes (which do not entail loss of civil rights) and more serious crimes (which do).

Small found that "Congress did not consider" the inclusion of foreign convictions, *id.* at 392, particularly in view of "the potential unfairness of preventing those with inapt foreign convictions from possessing guns." *Id.* at 394. Nor did Congress consider here that less serious offenders would be subjected to enhanced sentences and firearms prohibition, but more serious offenders would not.

II. FOPA'S FINDINGS ON "THE RIGHT TO KEEP AND BEAR ARMS" BY "LAW-ABIDING CITIZENS" COUNSELS A BROAD INTERPRETATION OF RESTORATION OF CIVIL RIGHTS

FOPA enacted Findings indicating Congress' understanding that law-abiding citizens have a constitutional right to keep and bear arms. The Act's prohibitions and exceptions should be interpreted with this purpose in mind. The civil-rights-restoration provision reflects that an ex-offender currently has the rights to vote, run for office, and serve on a jury, and thus is considered to be a law-abiding

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[12]In one example, "the language creates another apparently senseless distinction between less serious crimes (misdemeanors punishable by more than one year's imprisonment) committed within the United States (not predicate crimes) and similar offenses committed abroad (predicate crimes)." *Id.*

citizen. Specifically, FOPA, § 1(b), 100 Stat. 449, declared as follows:

> CONGRESSIONAL FINDINGS--The Congress finds that–
>
> (1) the rights of citizens--
>
> (A) to keep and bear arms under the second amendment to the United States Constitution;
>
> (B) to security against illegal and unreasonable searches and seizures under the fourth amendment;
>
> (C) against uncompensated taking of property, double jeopardy, and assurance of due process of law under the fifth amendment; and
>
> (D) against unconstitutional exercise of authority under the ninth and tenth amendments;
>
> require additional legislation to correct existing firearms statutes and enforcement policies; and
>
> (2) additional legislation is required to reaffirm the intent of the Congress, as expressed in section 101 of the Gun Control Act of 1968, that "it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trap shooting, target shooting, personal protection, or any other lawful activity, and that this title is not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful

purposes."

After declaring "the right[] of citizens . . . to keep and bear arms" under the Second Amendment, Congress qualified that by according that right to "law-abiding citizens." A "law-abiding citizen" is a citizen who the State recognizes as having full civil rights, including the rights to vote, run for office, and to serve on a jury.

If a person convicted of a more serious offense may, as recognized by State law, be considered again a law-abiding citizen and possess a firearm, it is an "undue or unnecessary Federal restriction or burden on law-abiding citizens" to impose a lifetime firearms prohibition on a person convicted of a less serious offense who the State recognizes as sufficiently law-abiding that it does not take away any civil rights. Like the rest of FOPA, § 921(a)(20) should be interpreted as "not intend[ing] to discourage or eliminate the private ownership or use of firearms by law-abiding citizens," who are those the State finds trustworthy enough to vote, run for office, and serve on a jury.

While the meaning of the Second Amendment is in dispute,[13] that issue is not before this Court.[14] This Court should give meaning to and defer to Congress' Findings, read with § 921(a)(20), that firearm possession is a right held by

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[13]*See United States v. Emerson*, 270 F.3d 203, 227-28 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002) (individual rights view); *accord*, Brief of the United States in Opposition to Certiorari, at 20. *But see Silveira v. Lockyer*, 312 F.3d 1052 (9th Cir.) ("collective rights" view), *reh. denied*, 328 F.3d 567 (9th Cir.), *cert. denied*, 540 U.S. 1046 (2003).

[14]*See Printz v. United States*, 521 U.S. 898, 939 (1997) (Thomas, J., concurring) ("As the parties did not raise this [Second Amendment] argument, however, we need not consider it here.").

those the States consider currently to be law-abiding citizens, i.e., who have full civil rights and who may lawfully possess firearms under State law.

III. THE CLAUSE SHOULD BE INTERPRETED TO AVOID EQUAL PROTECTION PROBLEMS

It is irrational to allow persons with more serious criminal records to avoid mandatory minimum incarcerations and to possess firearms, but to subject persons with less serious records to the mandatory minimums and to the prohibition on firearm possession. "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

U.S. Dept. of Treasury, Bureau of Alcohol, Tobacco & Firearms v. Galioto, 477 U.S. 556 (1986), *dismissing as moot*, 602 F. Supp. 682 (D. N.J. 1985), concerned pre-FOPA law allowing felons, but not persons committed to mental institutions, to petition for relief from firearms disabilities. This Court explained:

> The District Court held that this scheme violated equal protection principles because, in its view, "[t]here is no rational basis for thus singling out mental patients for permanent disabled status, particularly as compared to convicts."

Id. at 559, quoting 602 F. Supp. at 689-90.

FOPA amended the law to allow all persons with disabilities to petition, thereby mooting the case. *Id.* at 559-

60. While this Court thereby did not resolve the issue on the merits, the irrational distinction here also raises difficult equal protection questions. These questions may be avoided by interpreting the statute to treat persons who never lost civil rights no worse than persons who did lose civil rights.[15]

Also analogous here is *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3rd Cir. 1981), which invalidated a state law on equal protection grounds requiring firearm purchasers to be identified by two freeholders, because a state cannot "arbitrarily establish categories of persons who can or cannot buy the weapons."[16]

In sum, this Court should construe "civil rights restored" in a manner so as not to raise questions under the equal protection component of the Fifth Amendment's due process clause.

IV. THE LEGISLATIVE HISTORY DEMONSTRATES AN EXPANSIVE MEANING OF RESTORATION OF CIVIL RIGHTS

FOPA revised the definition in § 921(a)(20) which had been enacted in Title I of the Gun Control Act ("GCA"), P.L. 90-618, 82 Stat. 1213, 1216 (1968). The GCA defined "crime

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[15]"There is no rational basis for allowing a misdemeanant convicted of assault with a deadly weapon to seek relief, while the defendant convicted of simple assault cannot." *In re Evans*, 49 Cal. App. 4th 1263, 1272, 57 Cal. Rptr. 2d 314 (1996).

[16]*See also Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 531-32 (6th Cir. 1998) (invalidating law which allowed some to possess certain firearms and prohibited similarly-situated persons from doing so).

punishable by imprisonment for a term exceeding one year" to exclude antitrust and similar business practices "as the Secretary may by regulation designate," and State misdemeanors "other than one involving a firearm or explosive" punishable by imprisonment for not more than two years.

The most complete analysis of the FOPA revision was set forth in Senate Report 98-583, to Accompany S. 914, 98th Cong., 2d Sess., 7 (1984),[17] which explained:

> The bill makes four changes in this Paragraph. First, it makes the court, rather than the Secretary, the final arbiter as to what constitutes a "similar offense relating to the regulation of business practices." Second, it removes the exception relating to state firearms laws so that state misdemeanors punishable by two years of imprisonment or less would not be disabling crimes under any circumstances.

Under the pre-FOPA version, a class of misdemeanants – those whose convictions involved a firearm or explosive – would be barred from firearms possession for life, while all other misdemeanants could possess firearms. FOPA's drafters saw it as irrational that persons convicted of the same class of

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[17] "There was no Senate Report on Pub.L. No. 99-308. S.Rep. No. 98-583 accompanied S. 914, the substantially similar predecessor to S. 49, the Senate bill which was the basis for Pub.L. No. 99-308." *National Rifle Ass'n v. Brady*, 914 F.2d 475, 477 n.1 (4th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

There was an earlier Senate report which was worded very similarly to the above report. *See* Senate Report No. 97-476, to Accompany S. 1030, 97th Cong., 2d Sess., 12, 18 (1982) (discussion of § 921(a)(20)), *id.* at 24 (discussion of § 925(c)).

misdemeanors would be treated differently.

Senate Report 98-583 proceeded to explain FOPA's choice-of-law provision as follows:

> Third, it requires that a "conviction" must be determined in accordance with the law of the jurisdiction where the underlying proceeding was held. This is intended to accommodate state reforms adopted since 1968, which permit dismissal of charges after a plea and successful completion of a probationary period, or which create "open-ended" offenses, conviction for which may be treated as misdemeanor or felony at the option of the court. Since the Federal prohibition is keyed to the state's conviction, state law should govern in these matters. In the case of "open-ended" offenses which are classed as felonies, but which may be reduced by the trial court, it is intended that these constitute a "crime punishable by imprisonment for a term exceeding one year" unless and until the court enters a decision to treat the offense as a misdemeanor.

Id. at 7.

The above recognized the primacy of State law in determining the nature of the offense and, by implication, who should be trusted to possess a firearm.[18]

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[18] *See People v. Holt*, 37 Cal. 3d 436, 452, 208 Cal. Rptr. 547, 690 P.2d 1207, 1215 (1984) (conviction of a "wobbler" crime is a misdemeanor "for all purposes" if the punishment is other than prison). Such conviction was disabling before FOPA, *McMullen v. United States*, 349 F. Supp. 1348 (C.D. Cal. 1972), but not under FOPA, *United States v. Grant*, 942 F.2d 794 (Table), 1991 WL 165534 (9th Cir. 1991).

Senate Report 98-583 inserted at the end of the above paragraph a footnote, *id.* at 7 n.16, which explained:

> For instance, the Supreme Court, in *Dickerson v. New Banner Institute, Inc.*, 103 S.Ct. 986 (1983), construed this definition to include guilty pleas where no final judgment had been rendered by the Court. S. 914, as reported, would leave such a determination to the states and would render the *Dickerson* decision inapposite where individual State courts or legislatures have decided to the contrary.

Dickerson refused to recognize an expungement under State law, noting also that a separate federal law explicitly excluded pardons, but that § 921(a)(20) did not. *Dickerson*, 460 U.S. at 114-15, 117. That law was 18 U.S.C. App. § 1201 *et seq.*, which was Title VII of the Omnibus Crime Control and Safe Streets Act of 1968, P.L. 90-351, 82 Stat. 225, 236 (1968), and which FOPA also repealed. Section 1202(a)(1) prohibited possession of a firearm by a person who "has been convicted by a court of the United States or a State or any political subdivision thereof of a felony . . . ." It provided: "'felony' means any offense punishable by imprisonment for a term exceeding one year . . . ." § 1202(c)(2). Section 1203 exempted a person who received a Federal or State pardon which expressly authorized the person to possess a firearm.

Senate Report 98-583 commented on the above in a discussion of the"exemption clause" as follows:

> Finally, S. 914 would exclude from such convictions any for which the person has received a pardon, civil rights restoration, or expungement of the record. Existing law incorporates a similar provision with respect to

> pardons in 18 U.S.C. app. 1202, relating to possession of firearms, but through oversight does not include any conforming provision in 18 U.S.C. 922, dealing with their purchase or receipt. This oversight, which resulted in a ruling that a state pardon does not permit a pardoned citizen to receive or purchase a firearm, despite the express provision in the pardon that he may possess it,[19] would be corrected.

Id. at 7.

Finally, Senate Report 98-583 explained the "unless clause" at the end of § 921(a)(20) as follows:

> In the event that the official granting the pardon, restoration of rights, or expungement of record does not intend that it restore the right to firearm ownership, this provision honors that intent as expressly provided in the order or pardon.[20]

Id. at 7.

In sum, pervading the last two sentences of § 921(a)(20) – the choice-of-law, exemption, and unless clauses – is deference to State law. While the States would differ on how and the extent to which they rendered restorations of rights and the other forms of alleviation in the exemption

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[19]The report here (*id.* at 7, n.17) cited *Thrall v. Wolfe*, 503 F.2d 318 (7th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).

[20]Although the above speaks of individualized governmental action which exists with pardons, expungements, and some restoration of rights laws, the text of the exemption clause leaves room for restoration of rights by operation of law.

clause, persons within the same States would be treated the same. Considering the purposes of the FOPA reforms, persons who never lost civil rights should not be treated worse than persons who lost civil rights and had them returned.

FOPA broadened § 925(c), the provision for petitioning the Secretary for removal of disabilities, by authorizing all persons with disabilities to file a petition, and repealing the restriction in the 1968 version which limited restoration only to "[a] person who has been convicted of a crime punishable by imprisonment for a term exceeding one year (other than a crime involving the use of a firearm or other weapon or a violation of this chapter or of the National Firearms Act) . . . ." 82 Stat. at 1225.

Senate Report 98-583 explained: "This is intended to provide a 'safety valve' whereby persons whose offenses were technical and nonviolent, or who have subsequently demonstrated their trustworthiness, may obtain relief." *Id.* at 26. The report explained further:

> Present law restricts relief to a relatively narrow category of persons convicted of felonies, i.e., those who have been convicted of crimes punishable by imprisonment for a term exceeding one year, as defined in 18 U.S.C. 921(a)(20), other than those involving the use of a firearm or Federal firearms offenses. This could arbitrarily exclude from relief persons who might otherwise be more trustworthy than those eligible, particularly if they have been convicted of technical or unintentional violations. Section 105(1) of the bill reported by the Committee amends 18 U.S.C. 925(c) to make any person prohibited from firearm or

> ammunition possession, shipment, receipt or transportation eligible to apply for relief. In light of evidence before the Committee that Gun Control Act charges have been abused in the past, with resultant convictions of persons not inclined to engage in any criminal activity, making relief available to such persons is essential. Moreover, the Committee's amendments to 18 U.S.C. 921(a)(20), described in more detail above, will also address the problems that have arisen in this regard by reducing the class of prohibited persons who might need to seek relief under this Subsection.

Thus, FOPA was intended to provide avenues for all classes of convicted persons to seek to overcome their firearms disabilities. As noted above, the 1968 GCA version excluded some persons who were more trustworthy from ever seeking relief, while allowing persons who were less trustworthy to pursue removal of firearms disabilities. Based on this purpose, the Congress that adopted FOPA would not have intended that misdemeanants who never had civil rights taken away could never in their entire lifetimes be considered as having civil rights restored, while felons who had all three civil rights taken away could have full civil rights restored.

The other legislative history of FOPA does not provide as comprehensive an explanation as the above and is sparse on the amendment to § 921(a)(20), indicating that this provision was non-controversial. However, it further points to the conclusion that Congress did not intend that a person who never lost civil rights would have firearms disabilities.

In hearings in 1982 on S. 1030, chief sponsor Senator James McClure explained that "the same rule on pardons,

expungement, and restoration of civil rights would apply to all. 'Conviction' would be as defined by the law of the jurisdiction where the person was charged." *The Firearms Owner Protection Act: Hearings Before the Committee on the Judiciary*, 97th Cong., 1st & 2nd Sess., on S. 1030, Serial No. J-97-87, at 46 (1982).

An NRA witness testified about the lack of a willfulness requirement in the GCA:

> Thus an individual who inadvertently commits a technical infraction is in fact guilty of a federal felony. Numerous individuals have been prosecuted and convicted on this basis – deprived of their civil rights to vote, hold office, and even own firearms (and in this case permanently, since one who is convicted of a violation of the act itself is barred from ever receiving "relief from disability" based on his good reputation and subsequent behavior).

Id. at 78.[21]

The FOPA bill was designated as S. 49 when debated on the Senate floor in 1985. Senator Orrin Hatch, the bill's floor manager, conducted a section-by-section analysis in which he explained:

> The Gun Control Act of 1968 currently bars any person who has been convicted of a felony from possessing a firearm. Federal courts have interpreted this to bar persons from possessing firearms who have had their criminal records expunged, who have been

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[21] *See id.* at 70 (witness convicted of technical GCA felony "had my rights restored as far as voting and holding office").

> pardoned, or who have had their full civil rights restored pursuant to State law.
>
> S. 49 grants authority to the jurisdiction (State) which prosecuted the individual to determine eligibility for firearm possession after a felony conviction or plea of guilty to a felony. This will accommodate State reforms enacted since 1968 which permit dismissal of charges after a plea and successful completion of a probationary period. Since the Federal prohibition is triggered by the States' conviction, the States's law as to what disqualifies an individual from firearms use should govern.

131 Cong. Rec. S8689 (June 24, 1985).[22]

Senator Hatch's commentary is unmistakable – where convicted of a State offense, the State would "determine eligibility for firearm possession," and State law "as to what disqualifies an individual from firearms use should govern."[23]

Given the above, it is inconceivable that Congress intended that persons in possession of full civil rights would be condemned to lifetime firearms disabilities while persons whose civil rights were taken away and given back are not.

There were no hearings or reports on any of the FOPA bills in the House of Representatives. However, the Judiciary

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[22]Senator Bacus asked: "Does placing a felon's stigma on persons who have received a full pardon advance legitimate law enforcement?" *Id.* at. S8700.

[23]*See also id.* at S9128 (July 9, 1985) (remarks of Senator Sasser) ("The same rules on pardon, relief, and expungement apply to all such restrictions.").

Committee reported H.R. 4227, which was seen as the anti-FOPA bill. Sponsored by Rep. Bill Hughes, it would not have changed the definition of § 921(a)(20). *See* House Report No. 99-495, to Accompany H.R. 4332, 99th Cong., 2d Sess., at 34 (1986), reprinted in 1986 U.S.C.C.A.N. 1327.[24]

The House FOPA bill, H.R. 945, came to the floor via a discharge petition. Two days of debate took place on H.R. 4227, known as the Hughes bill, and H.R. 945, know as the Volkmer substitute. *See* 132 Cong. Rec. H 1644 ff. (April 9, 1986), H 1741 ff. (April 10, 1986).

Congressman Harold Volkmer, chief sponsor of H.R. 945, opened the debate, stating that his bill "will truly return constitutional rights to the citizens of this country." 132 Cong. Rec. H1650 (April 9, 1986). "This bill will assure that the civil rights of our 200,000 licensed dealers and 80 million firearms owners and collectors will not be abused." *Id.* at H1651.

Volkmer mentioned the case of William Smith, who an ATF agent persuaded to commit a technical GCA offense, explaining:

> Smith was unlucky, as he wrote, "Now I have no rights, I am a felon." Apart from all else, he could never own a gun again, for under the Gun Control Act a person convicted under the act itself cannot apply for relief from disability to own a gun. No matter how good his record, no matter how unintentional his violation, he is forever barred. Nor was Smith's case an

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[24]The report included an assessment by the Bureau of Alcohol, Tobacco and Firearms which noted that S. 49 "would require the Bureau to examine the peculiar laws of each State to determine whether a person is convicted for Federal purposes." *Id.* at 20.

> isolated one; 31 other small businessmen had been set up in the same series of cases.

Id. at H1652.

Although the above reference was in the context of the amendment to § 925(c), it illustrates the intent of FOPA that trustworthy persons should not be subject to a lifetime firearms ban. FOPA's definition in § 921(a)(20) was not controversial, as there were no direct references to it in the House debates. Given the broad purpose of FOPA to protect what its sponsors described as constitutional and civil rights,[25] a howl of protest would have erupted had it been suggested that civil rights could be considered as restored for felons but not misdemeanants.

At the end of the debate in the House, the Hughes bill, H.R. 4332 was defeated, while the Volkmer substitute, H.R. 945, was passed as the FOPA. When the Volkmer substitute passed, it then became "H.R. 4332, as passed by the House," while "a similar House bill (H.R. 4332) [the Hughes bill] was laid on the table."[26] 132 Cong. Rec. H 1753, 1757 (April 10, 1986).

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[25]*E.g.*, *id.* at H1653 (Rep. Volkmer) ("My legislation is procivil rights for gun owners. My legislation will assure that every gun owner in this country is guaranteed his and her rights provided by the Constitution."); *id.* at H1659 (Rep. Alexander) ("The purpose of this legislation to balance the rights of law-abiding citizens to bear arms against the very real needs of law enforcement officials to fight crime."); *id.* at H1661 (Rep. Vucanovich) (FOPA would "correct the unnecessary burden placed on the law-abiding American citizens who exercise their constitutional right to own a firearm.").

[26]The FOPA bill being renamed H.R. 4227 has caused confusion, such as the reprinting of House Report No. 99-495 under the title "Firearms Owners' Protection Act" in 1986 U.S.C.C.A.N. 1327. That report opposed FOPA.

In sum, the legislative history buttresses the statutory scheme under which a person currently in possession of full civil rights, without regard to which (if any) may have been taken away and returned in the past, is considered as having civil rights restored.

V. THE CONTRASTING LANGUAGE IN § 921(a)(33) DEMONSTRATES THAT CIVIL RIGHTS MAY BE RESTORED UNDER § 921(a)(20) WITHOUT THE PRIOR LOSS OF SUCH CIVIL RIGHTS

In 1996, Congress enacted § 922(g)(9), which made it unlawful for any person "who has been convicted in any court of a misdemeanor crime of domestic violence" to possess a firearm. Omnibus Consolidated Appropriations Act, 1997, P.L. 104-208, Title VI, § 658(b), 110 Stat. 3009 (Sept. 30, 1996). Section 921(a)(33)(A) defines the term "misdemeanor crime of domestic violence," but paragraph (B)(ii) provides:

> A person shall not be considered to have been convicted of such an offense for purposes of this chapter if the conviction has been expunged or set aside, or is an offense for which the person has been pardoned or has had civil rights restored (if the law of the applicable jurisdiction provides for the loss of civil rights under such an offense) unless the pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

It is noteworthy that Congress saw it necessary after "has had civil rights restored" to insert the parenthetical "(if the law of the applicable jurisdiction provides for the loss of civil

rights under such an offense)." No such phrase exists in § 921(a)(20). "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (citation omitted).

The parenthetical would have been unnecessary if "civil rights restored" necessarily required that the applicable jurisdiction provided for the loss of civil rights. It serves to exclude the alternative, i.e., a restoration of rights where the law of the applicable jurisdiction *does not* provide for the loss of civil rights for the offense. The framers of § 921(a)(33) apparently were aware that, under existing precedent, a misdemeanant whose civil rights were never taken away was considered as having civil rights restored, or the parenthetical would have been unnecessary.

Indeed, in 1990, the Sixth Circuit had found "no rational basis" between civil rights "that were not expressly taken away," and those that "were negated . . . and then reinstated." *Cassidy*, 899 F.2d at 549 n.13. And in 1993, the Fifth Circuit was "unwilling to pass through the looking glass into such a Wonderland" that would be entailed in "convicting a person under § 922(g) who has never lost his civil rights and who is not prohibited by the state from possessing a gun while simultaneously immunizing from such a conviction one who was stripped of his civil rights, including gun possession, but has subsequently had them affirmatively 'restored.'" *Thomas*, 991 F.2d at 212.

Accordingly, the existence of the parenthetical in § 921(a)(33) indicates that § 921(a)(20) has no such limitation. Under the latter, civil rights may be restored regardless of

whether "the law of the applicable jurisdiction provides for the loss of civil rights under such an offense."

VI. THE GOVERNMENT HAS ARGUED ELSEWHERE THAT "RESTORE" DOES NOT REQUIRE A RETURN TO A PREVIOUS CONDITION

The government has not been consistent in interpreting the meaning of "restore" under the GCA. In seeking to expand the scope of criminal acts, it has argued in another context that "restore" means to create something that did not exist previously. While the strict construction of criminal statutes against the government precludes that reading, the same rule here counsels a broad interpretation of the word.

Title II of the GCA defines some firearms to include weapons which may "be readily restored" to shoot. 26 U.S.C. § 5845(b), (c), (d). Holding that a rifle receiver was not a machinegun receiver, the D.C. Circuit noted:

> One might contend that a new, unaltered receiver never achieved the status of machinegun and therefore cannot be "restored." The Bureau [of Alcohol, Tobacco and Firearms], however, believes that the phrase "readily restored" applies even to weapons that have never been assembled.

F. J. Vollmer Co., Inc. v. Higgins, 23 F.3d 448, 452 n.6 (D.C. Cir. 1994), citing *United States v. Drasen*, 845 F.2d 731, 735-37 (7th Cir.), *cert. denied*, 488 U.S. 909 (1988).

At the government's urging, *Drasen* held that parts never made into rifles could be "readily restored" as rifles. *Id.* *Cf. id.* at 738 (Manion, C.J., dissenting) (this "did not give the defendants fair notice that their conduct was illegal"), citing

United States v. Drasen, 665 F. Supp. 598 (N.D. Ill. 1987). The district court had relied on the meaning of "restore" as "return to a previous condition," and "the presumption in favor of construing criminal statutes against the government." 665 F. Supp. at 603.

In another GCA case, the government sought to read "restored" as meaning "converted," but this was rejected. *Thompson/Center Arms Co. v. United States*, 924 F.2d 1041, 1044 (Fed. Cir. 1991), *aff'd.*, 504 U.S. 505, 518 (1992) (applying rule of lenity). It seems disingenuous to argue that "readily restored" does not require returning to a previous condition, but that "had civil rights restored" does.

"No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). A person should be bound only by a literal definition of "readily restored" in the context of the definition of a firearm. But here, a reasonable person would think that civil rights have been "restored" if one or more have been taken away and given back, and also if none of them were taken away.

CONCLUSION

The Court should reverse the decision of the court of appeals.

Respectfully submitted,

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